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## Articles

### CONSTITUTIONAL ARGUMENT AS JEREMIAD

Timothy P. O'Neill\*

#### I. INTRODUCTION

Paul Harding's 2010 Pulitzer Prize-winning novel *Tinkers* deals with three generations of fathers in New England.<sup>1</sup> It illustrates V.S. Naipaul's observation that "[i]t is as if we all carry in our makeup the effects of accidents that have befallen our ancestors, as if we are in many ways programmed before we are born, our lives half outlined for us."<sup>2</sup>

Much of the novel takes place in the mind of George Washington Crosby, an elderly man on his death bed. We learn of his grandfather, a failed minister who suffered a breakdown and was institutionalized by his wife. We see the profound effect this had on Howard, the minister's son (and George's father). Howard, an epileptic, years later discovered that his wife also planned to institutionalize him. In order to escape his father's fate, Howard abandoned his wife and children (including George), moved to a new city, and began a new life.

In response, Howard's son George became the epitome of the responsible, family-oriented man: "George could dig and pour the concrete basement for a house. He could saw the lumber and nail the frame. He could wire the rooms and fix the plumbing."<sup>3</sup> He is described as "a fastidiously neat dresser."<sup>4</sup> By the time of his death he had carefully accumulated numerous checking accounts, savings accounts, certificates of deposit, and safety-deposit boxes.<sup>5</sup>

Everything in George's life reflected perfect order. And this need for order was best illustrated in his passion for repairing clocks. George became interested in this as an adult after he bought a clock at a tag sale. The owner also gave him a reprint of an Eighteenth Century clock repair manual.<sup>6</sup> This turned into a very lucrative business for George.

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\* Professor, The John Marshall Law School. This Article is dedicated to my wife Jane Rutherford, who has been a source of joy and inspiration to me for the last thirty-four years. I also wish to acknowledge the excellent research assistance of Caitlyn McEvoy.

<sup>1</sup> PAUL HARDING, *TINKERS* (2009).

<sup>2</sup> V.S. NAIPAUL, *THE ENIGMA OF ARRIVAL* 77 (1987).

<sup>3</sup> HARDING, *supra* note 1, at 12.

<sup>4</sup> *Id.* at 48.

<sup>5</sup> *Id.* at 164–65.

<sup>6</sup> *Id.* at 14.

Interspersed throughout the novel are excerpts from the repair book supposedly published in 1783. The passages combine details on clock repair with philosophical musings on the nature of time. The book is entitled *The Reasonable Horologist*<sup>7</sup> and is written by the Reverend Kenner Davenport.<sup>8</sup> One of *The Reasonable Horologist's* more striking quotations describes re-assembling a clock and then goes on to contrast the nature of time in the universe with how it is perceived by mere mortals: "[n]ow, the horologist looks upon an open-faced, fairy-book contraption; gears lean to and fro like a lazy machine in a dream. The universe's time cannot be marked thusly. Such a crooked and flimsy device could only keep the fantastic hours of unruly ghosts."<sup>9</sup>

The reader may wonder how Harding acquired this interest in a horologist's philosophical distinction between concepts of time. There are several clues. The *New York Times* has described Harding as "an avid reader of 19th-century novels."<sup>10</sup> Interestingly, in the novel George's father was given a first-edition of *The Scarlet Letter* dated 1852 and personally signed by Nathaniel Hawthorne.<sup>11</sup> A Hawthorne aficionado, however, might recognize that *The Scarlet Letter* was actually published in 1850.<sup>12</sup>

What American novel was published in 1852? In an interview, Harding has admitted "I love Melville."<sup>13</sup> And in 1852 Melville published a novel that included an imaginary pamphlet containing a lecture entitled "Chronometricals and Horologicals" that uses time as a metaphor for distinguishing divine truth from earthly experience.

## II. HERMAN MELVILLE'S CHRONOMETRICALS AND HOROLOGICALS

The novel was *Pierre; or, The Ambiguities*.<sup>14</sup> It was the book Melville published immediately after *Moby Dick*.<sup>15</sup> *Pierre* was both a critical and

<sup>7</sup> A horologist is "a maker of clocks or watches." *Horologist*, MERRIAM-WEBSTER'S DICTIONARY, <http://www.merriam-webster.com/dictionary/horologist> (last visited Sept. 23, 2010).

<sup>8</sup> Dave Weich, *Paul Harding Beats the Tar out of Time*, POWELLS.COM (Dec. 29, 2008), <http://www.powells.com/authors/paulharding.html>. In an interview with Harding, he confirms that *The Reasonable Horologist* is "totally made up." *Id.* He also reveals that the name Kenner Davenport is an amalgam of the names of the critic Hugh Kenner and the writer Guy Davenport. *Id.*

<sup>9</sup> HARDING, *supra* note 1, at 17.

<sup>10</sup> Motoko Rich, *Mr. Cinderella: From Rejection Notes to the Pulitzer*, N.Y. TIMES, Apr. 19, 2010, at C5.

<sup>11</sup> HARDING, *supra* note 1, at 43.

<sup>12</sup> NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Penguin Books 2009) (1850).

<sup>13</sup> See Weich, *supra* note 8.

<sup>14</sup> HERMAN MELVILLE, *PIERRE; OR, THE AMBIGUITIES* (Penguin Books 1996) (1852) [hereinafter *PIERRE*]. All references to passages in *Pierre* are from the 1996 edition.

financial failure.<sup>16</sup> John Updike wrote that "*Pierre* proved to be . . . grindingly, ludicrously bad. It is doubtful if elsewhere in the history of literature two books as good and bad as 'Moby Dick' and 'Pierre' have been written back to back."<sup>17</sup>

Despite this, the novel does contain one episode that deserves attention. In the middle of the book, Pierre finds a torn pamphlet containing a lecture entitled, as noted above, "Chronometricals and Horologicals."<sup>18</sup> The chronometer is a device used on ships that always provides Greenwich Mean Time wherever it is in the world. The lecturer—who Melville names "Plotinus Plinlimmon"—uses the regularity of the chronometer as a metaphor for unchanging divine truth. He then compares it to changeable, local, horological time:

Now in an artificial world like ours, the soul of man is further removed from its God and the Heavenly Truth, than the chronometer carried to China, is from Greenwich. And, as that chronometer, if at all accurate, will pronounce it to be 12 o'clock high-noon, when the China local watches say, perhaps, it is 12 o'clock midnight; so the chronometric soul, if in this world true to its great Greenwich in the other, will always, in its so-called intuitions of right and wrong, be contradicting the

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<sup>15</sup> HERMAN MELVILLE, *MOBY DICK; OR, THE WHALE* (Penguin Group 2009) (1851).

<sup>16</sup> Some of the contemporary reviews of *Pierre* are worth quoting at length. See Charles Gordon Greene, *THE BOSTON POST*, Aug. 4, 1852 ("*Pierre; or The Ambiguities* is, perhaps, the craziest fiction extant. . . . [T]he amount of utter trash in the volume is almost infinite . . . . [W]e believe we shall *never* see the man who has endured the reading of the whole of it . . . .") (emphasis in original); George Washington Peck, *NEW YORK AMERICAN WHIG REVIEW*, Nov., 1852 ("A bad book! . . . [W]e never met with so turgid, pretentious, and useless a book as *Pierre*."); John R. Thompson, *RICHMOND SOUTHERN LITERARY MESSENGER*, Sept., 1852 ("[A]s for *The Ambiguities*, we are compelled to say that it seems to us the most aptly titled volume we have met with for years . . . . [L]eave [it] unbought on the shelves of the bookseller."); *WASHINGTON NATIONAL ERA*, Aug. 19, 1852 ("Truly is there 'but one step from the sublime to the ridiculous,' and as truly hath Mr. Melville herein accomplished it."); William Young, *NEW YORK ALBION*, Aug. 21, 1852 ("[A] dead failure . . . . [T]here is scarcely a page of dialogue that is not absurd to the last degree."). All of these quotes can be found at *Contemporary Criticism and Reviews, THE LIFE AND WORKS OF HERMAN MELVILLE*, <http://www.melville.org/hmpierre.htm#Contemporary> (last visited Sept. 22, 2010). Eight months after its publication *Pierre* had sold only 283 copies out of a first edition run of 2310; in Melville's entire lifetime, the royalties for *Pierre* amounted to \$157. John Updike, *Reflections: Melville's Withdrawal*, *THE NEW YORKER*, May 10, 1982, at 128.

<sup>17</sup> Updike, *supra* note 16, at 124.

<sup>18</sup> *PIERRE*, *supra* note 14, at 210–15.

mere local standards and watch-maker's brains of this earth.<sup>19</sup>

The lecturer proceeds to imagine a genius, such as Francis Bacon, as a simple horologist, and then makes this comparison: "Bacon's brains were mere watch-maker's brains; but Christ was a chronometer; and the most exquisitely adjusted and exact one, and the least affected by all terrestrial jarrings, of any that have ever come to us."<sup>20</sup> So why was Christ rejected during his time on earth? "[B]ecause he carried that Heaven's time in Jerusalem, while the Jews carried Jerusalem time there."<sup>21</sup>

Does that mean that a person in China should reject the time expressed by his watches made by local horologists in favor of the universal chronometer? No, because if he did so "he would be guilty of all manner of absurdities:—going to bed at noon, say, when his neighbors would be sitting down to dinner."<sup>22</sup>

But then what is the purpose of God revealing the "heavenly chronometer"<sup>23</sup> to men? Because although local horological time might "answer well enough here," man must understand that his local time is "by no means universally applicable." God wants to make known to man that "the central Greenwich in which He dwells goes by a somewhat different method from this world."<sup>24</sup>

What follows is perhaps the most important passage of the lecture: "[a]nd yet it follows not from this, that God's truth is one thing and man's truth another; but—as above hinted, and as will be further elucidated in subsequent lectures—*by their very contradictions they are made to correspond.*"<sup>25</sup> Unfortunately, we never learn what was contained in those subsequent lectures, because several paragraphs later Melville tells us "[b]ut here the pamphlet was torn, and came to a most untidy termination."<sup>26</sup>

And here is the irony. As a novel, *Pierre* today is generally unread and ignored. But as a part of American intellectual history, it occupies an important place. That is because the "Chronometricals and Horologicals" section of *Pierre* became the centerpiece of Sacvan

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<sup>19</sup> *Id.* at 211.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 212.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (emphasis added).

<sup>26</sup> *Id.* at 215.

Bercovitch's argument in 1978 in his seminal work, *The American Jeremiad*.<sup>27</sup>

### III. CHRONOMETRICALS AND HOROLOGICALS IN PRE-REVOLUTIONARY AMERICA

The standard definition of "jeremiad" is "a prolonged lamentation or complaint."<sup>28</sup> The word is derived from the biblical prophet Jeremiah, who has traditionally been considered the author of two books of the Old Testament: *Jeremiah* and *Lamentations*.

The *Book of Jeremiah* predicts the downfall of the Kingdom of Judah because the people had broken the covenant with God: "I had planted thee a noble vine, wholly a right seed: how then art thou turned into the degenerate plant of a strange vine unto me?"<sup>29</sup> And the Book of Lamentations is indeed an extended lament written after Jeremiah's prediction of Judah's downfall had come to pass. It bemoans the fall of Judah in passages such as "Judah is gone into captivity because of affliction . . . she dwelleth among the heathen, she findeth no rest: all her persecutors overtook her . . . [N]one come to the solemn feasts: all her gates are desolate: her priests sigh, her virgins are afflicted, and she is in bitterness."<sup>30</sup>

Bercovitch describes what he calls the traditional "European jeremiad" that dates back to religious practices in the Middle Ages.<sup>31</sup> It was:

[A] lament over the ways of the world. It decried the sins of "the people" . . . and warned of God's wrath to follow. Generation after generation, from the medieval era through the Renaissance, Catholic and then Protestant audiences heard the familiar refrain. . . . All of history proved it: humanity was naturally depraved. . . . The preachers used [Biblical] texts in their jeremiads as moral lessons, but the texts themselves held out little hope, if any.<sup>32</sup>

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<sup>27</sup> SACVAN BERCOVITCH, *THE AMERICAN JEREMIAD* (1978).

<sup>28</sup> *Jeremiad*, MERRIAM-WEBSTER'S DICTIONARY, <http://www.merriam-webster.com/dictionary/jeremiad> (last visited Sept. 23, 2010).

<sup>29</sup> *Jeremiah* 2:21.

<sup>30</sup> *Lamentations* 1:3–4.

<sup>31</sup> BERCOVITCH, *supra* note 27, at 7.

<sup>32</sup> *Id.*

## 38 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 45]

The most famous analysis of the transfer of the jeremiad from Europe to America was offered by Perry Miller in 1956 in his classic study *Errand into the Wilderness*.<sup>33</sup> Miller's thesis was that the Puritan "errand" changed dramatically during the Seventeenth Century. Miller described the first concept of the errand as dating from the Great Migration of 1630. These Puritans did not see themselves as "a battered remnant of suffering Separatists thrown up on a rocky shore."<sup>34</sup> On the contrary, they saw themselves as "an organized task force of Christians . . . [who] went [to America] in order to work out that complete reformation which was not yet accomplished in England and Europe, but which would quickly be accomplished if only the saints back there had a working model to guide them."<sup>35</sup> Quite literally, in the famous words of John Winthrop, they thought "that wee shall be as a Citty upon a Hill, the eies of all people" watching.<sup>36</sup>

After the collapse of Cromwell's Protectorate in 1660, however, the Puritans no longer felt that King Charles II's England would ever look to them as an example.<sup>37</sup> Thus, they turned from looking outward—being a model for others—to looking inward. As Miller expresses it, "[they] found that they had no other place to search but within themselves—even though, at first sight, that repository appeared to be nothing but a sink of iniquity."<sup>38</sup>

Thus, the Puritans had to re-define their mission: "[t]heir errand having failed in the first sense of the term, they were left with the second, and required to fill it with meaning by themselves and out of themselves."<sup>39</sup> One manifestation of this new introspection can be seen in a synod of Puritan clergy and lay elders who convened in Boston in 1679.<sup>40</sup> After engaging in a collective examination of conscience, the

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<sup>33</sup> PERRY MILLER, *ERRAND INTO THE WILDERNESS* (Belknap Press of Harv. Univ. 1978) (1956).

<sup>34</sup> *Id.* at 11.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *King Charles II*, SPARTACUS EDUCATIONAL, <http://www.spartacus.schoolnet.co.uk/STUcharles2.htm> (last visited Sept. 23, 2010). After Charles II assumed the throne, the pro-Royalist Parliament passed the Act of Uniformity, making Puritan acts of worship illegal. *Id.* Puritans also lost their power in politics: they were forbidden from serving in the House of Commons. *Id.* Additionally, Puritans were barred from universities and from all teaching positions. *Id.*

<sup>38</sup> MILLER, *supra* note 33, at 15.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 7–8; BERCOVITCH, *supra* note 27, at 5–6.

synod essentially issued a twelve-count indictment carefully cataloguing the moral failures of the community.<sup>41</sup>

The synod's criticisms had a profound impact on New England Puritans. Miller writes that the report became a veritable "handbook for preachers."<sup>42</sup> The standard sermon would begin with the preacher taking a verse from Isaiah or Jeremiah. He would then remind the congregation that God would avenge the evil done by his chosen people; and the preacher would then go through the twelve categories adding, when possible, the even more evil things the community had done since the report was published. In reviewing these early American "jeremiads," Miller states that "in the whole literature of the world . . . there is hardly such another uninhibited and unrelenting documentation of a people's descent into corruption."<sup>43</sup> Miller contends that the New England jeremiad is America's first distinctive literary genre.<sup>44</sup>

It is here that Bercovitch parts company with Miller's analysis. Bercovitch contends that Miller's focus on the cataloguing of sins places too dark a spin on the jeremiad. On the contrary, Bercovitch emphasizes "[the] pervasive theme of affirmation and exultation" that runs through the American, as opposed to the European, jeremiad.<sup>45</sup> The Puritans continued to believe that they *were* God's chosen people. Bercovitch focuses on the "unshakable optimism" in the American jeremiad, including its "promise of ultimate success."<sup>46</sup>

And here is where Melville's distinction between *chronometricals* and *horologicals* becomes germane. The lecture in *Pierre* warns that a man must not assume that his own local, horological sense of time is universally applicable; he needs to be aware that the chronometer keeps a different time that is accurate in a different way. So, too, the moral standards contained in human horologicals may be quite different from those higher standards contained in the heavenly chronometer. Nevertheless, the lecturer insists, "it follows not from this, that God's truth is one thing and man's truth another; but—as above hinted, and as

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<sup>41</sup> MILLER, *supra* note 33, 7–8. What Miller refers to as "a staggering compendium of iniquity" was arranged under twelve headings: first, a "decay of godliness"; second, personal manifestations of pride; third, heresy; fourth, swearing as well as sleeping during sermons; fifth, Sabbath violations; sixth, a breakdown in discipline within families; seventh, increasing litigiousness; eighth, increase in alcohol use and sexual misconduct; ninth, increased lying; tenth, decrease in business ethics; eleventh, refusal to reform; and twelfth, a dearth of civic spirit. *Id.*

<sup>42</sup> *Id.* at 8.

<sup>43</sup> *Id.*

<sup>44</sup> BERCOVITCH, *supra* note 27, at 6.

<sup>45</sup> *Id.* at 6–7.

<sup>46</sup> *Id.* at 7.



## 40 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 45]

will be further elucidated in subsequent lectures—*by their very contradictions they are made to correspond.*"<sup>47</sup>

How does this occur? As noted above, we do not know because "the pamphlet was torn, and came to a most untidy termination."<sup>48</sup>

But for Bercovitch this difference between the horological and chronometrical, between man's truth and God's truth, is not meant to yield a final answer or resolution. Rather, it provides the blueprint for a *process*. For Bercovitch, the American jeremiad's continual complaint about man's failure to live up to God's standard—or as he expresses it, the continual lamentation concerning "a growing discrepancy between fact and ideal"<sup>49</sup>—was not meant to describe a historical position. Rather, it explains a "mode of rhetoric."<sup>50</sup> The lamentation is a rhetorical "strategy" that is used "for prodding the community forward."<sup>51</sup> And, reflecting Melville's fictional lecturer's contention that the contradictions between horologicals and chronometricals may actually be made to correspond, the American jeremiad reflected "the belief that fact and ideal *would be made to correspond.*"<sup>52</sup>

## IV. JEREMIAD AS A PROCESS

The structure of the American jeremiad is thus comprised of three steps: 1) an invocation of a standard to be lived up to; 2) a demonstration of how the current behavior of the people has fallen short of that standard; and 3) a presentation of a vision of the future when the people (as God's chosen ones) return to that standard.

In his chapter entitled "Ritual of Consensus,"<sup>53</sup> Bercovitch further asserts that the jeremiad became a "national ritual" in American political life.<sup>54</sup> For example, the Federalists seized on "the Revolution" as the divine chronometer and opposed it to rebellion in a broad sense, which needed to be curbed or restrained.<sup>55</sup> Whether it was insurgents complaining about taxation through Shays' Rebellion or debtors looking for relief from state governments, all could be painted as mere rebels deviating from the hallowed values of the Revolution.

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<sup>47</sup> PIERRE, *supra* note 14, at 212 (emphasis added).

<sup>48</sup> *Id.* at 215.

<sup>49</sup> BERCOVITCH, *supra* note 27, at 61.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 132–75.

<sup>54</sup> *Id.* at 132.

<sup>55</sup> *Id.* at 134–36.

As the Nineteenth Century wore on, the issue became which party could claim the mantle of the Revolution: who were the troublesome rebels and who were the true supporters of American revolutionary ideals? Bercovitch notes that “[i]n virtually every area of life, the jeremiad became the official ritual form of continuing revolution.”<sup>56</sup> For example, when Whigs faced off against Jacksonian Democrats in the 1830’s, “both parties agreed that the nation was in a crisis of identity, and both parties, each from its own perspective, proposed the same solution. They sought to stabilize society by rallying their countrymen, once again, to the chronometer of continuing revolution.”<sup>57</sup>

#### A. *The Jeremiad and Constitutional Interpretation*

It is interesting to examine how constitutional argument has absorbed this structure of the American jeremiad. The dynamic of the jeremiad—defining the standard, showing how we currently fall short, and then demonstrating how the current failure can be rectified through return to the ancient standard—is similar to the dynamic of constitutional argument in general.

Consider Jack Balkin’s recent work in constitutional interpretation where he distinguishes between what he calls the “original meaning” of a constitutional text as opposed to the “*original expected application*” of the text.<sup>58</sup> As an example, he cites Justice Scalia’s approach to the Cruel and Unusual Punishment Clause of the Eighth Amendment. Scalia has written that the value underlying this clause “is not a moral principle of ‘cruelty’ that philosophers can play with in the future, but rather the existing society’s assessment of what [was] cruel [in 1791]. . . . It is, in other words, rooted in the moral perceptions *of the time*.”<sup>59</sup> Scalia would thus answer the question of whether the death penalty violates the Eighth Amendment by asking how people living in 1791 would have answered the question.<sup>60</sup> Balkin refers to Scalia’s version of originalism as constituting a search for the “*original expected application*.”<sup>61</sup>

Balkin then contrasts this with what he contends should be the proper inquiry: the quest for the “original meaning” of a constitutional clause. In searching for the “original meaning,” Balkin contends that we

<sup>56</sup> *Id.* at 141.

<sup>57</sup> *Id.* at 143.

<sup>58</sup> Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292 (2007) (emphasis added). A fuller discussion of this may be found in my article *Scalia’s Poker: Puzzles and Mysteries in Constitutional Interpretation*, 24 CONST. COMMENT. 663 (2007).

<sup>59</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 145 (Amy Gutman ed., 1997) (emphasis added).

<sup>60</sup> *Id.*

<sup>61</sup> Balkin, *supra*, note 58, at 293 (emphasis added).

## 42 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 45]

must look not only to the text but to the principles underlying the text.<sup>62</sup> What is “cruel and unusual” must be determined by “contemporary application” of this constitutional command.<sup>63</sup> According to Balkin, each generation “must take responsibility for interpreting and implementing the Constitution in its own era.”<sup>64</sup>

Balkin’s “original meaning” theory treats a constitutional provision such as the Cruel and Unusual Punishment Clause as a chronometer. It treats the clause as a standard that exists outside of time. It functions as a challenge to our narrow, local, horological sense of justice. And the form of Balkin’s argument follows the jeremiad: first, the invocation of the aspirational “heavenly chronometer” in the form of a constitutional provision challenging us to live up to an ideal; second, a description of how we have currently strayed from that ideal; third, a demonstration that by correcting this wrong we will merely be returning to the chronometric standard we have always embraced.

But unlike Balkin’s chronometrical interpretive method, Justice Scalia’s is unabashedly horological. The meaning of “cruel and unusual” to Scalia is “rooted in the moral perceptions *of the time*” it was adopted in 1791.<sup>65</sup> While Balkin sees “cruel and unusual” as an evolving *standard*, Scalia views it as a fixed *rule* adopted in 1791.

Note the similarity of Balkin’s theory to Ronald Dworkin’s distinction between constitutional *concepts* and *conceptions*.<sup>66</sup> For example, Dworkin asserts that in considering whether segregated schools are unconstitutional, it is irrelevant that the Nineteenth Century authors of the Equal Protection Clause of the Fourteenth Amendment may have supported segregated schools. Dworkin asserts that “equal protection” is a *concept* that admits of many and changing *conceptions*. The Clause constitutionalizes an aspirational *concept* that can support many different *conceptions* over time.<sup>67</sup>

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<sup>62</sup> Balkin, *supra* note 58, at 304.

<sup>63</sup> *Id.* at 295.

<sup>64</sup> *Id.* at 307. See, for example, Justice John Paul Stevens’ recent comments on interpreting the Eighth Amendment’s prohibition against cruel and unusual punishment:

Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time . . . Standards of decency have evolved since 1980. They will never stop doing so.

Graham v. Florida, 130 S. Ct. 2011, 2036 (2010) (Stevens, J., concurring). The most recent scholarly defense of this interpretive position can be found in DAVID STRAUSS, THE LIVING CONSTITUTION (2010).

<sup>65</sup> SCALIA, *supra* note 59, at 145 (emphasis added).

<sup>66</sup> See generally RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 132–37 (1977).

<sup>67</sup> See *id.* at 223–29.

Applying Dworkin's theory to Balkin's hypothetical, we can say that since the adoption of the Bill of Rights in 1791, Americans have never wavered from accepting the chronometrical standard that forbids the use of cruel and unusual punishments. Yet over the last two centuries, our view of precisely which punishments *are* "cruel and unusual" has evolved. Or, as Dworkin would express it, the *concept* of forbidding "cruel and unusual punishment" has not changed since 1791, but our *conceptions* of what is "cruel and unusual" have changed.

*B. The Resolution of the Slavery Issue Demonstrates the Jeremiad as a Process*

This vision of the jeremiad as a process that continually challenges us to live up to chronometrical standards was expressed in a fresh way by Jedediah Purdy in his recent book *A Tolerable Anarchy*.<sup>68</sup> Purdy begins by noting how easy it is to accuse the Founding Fathers of hypocrisy. He points to Samuel Johnson's withering comment in 1775 about the colonists' repeated demands for "liberty": "[w]hy is it that we hear the loudest yelps for liberty from the drivers of negroes?"<sup>69</sup> Yet Purdy argues that the very absurdity of a slave-holding nation talking about freedom and equality for all paradoxically made change all the more possible: "[a] doctrine of universal and inalienable rights could not easily uphold an order of hierarchy and oppression."<sup>70</sup> If the promise of "freedom" did not exist *in fact* for many Americans, it certainly existed *in theory*. And the gap between theory and reality actually "made the prophets of a possible America seem *more American*, sometimes, than the defenders of the country that actually existed."<sup>71</sup>

The American promise of freedom for all can be seen as a chronometer. It has provided an absolute measure against which America has continually come up short. The paradox is that "the founding principles gave *ironic authority* to those whom American

<sup>68</sup> JEDEDIAH PURDY, *A TOLERABLE ANARCHY: REBELS, REACTIONARIES, AND THE MAKING OF AMERICAN FREEDOM* (Vintage Books 2010) (2009).

<sup>69</sup> *Id.* at 5 (citing SAMUEL JOHNSON, *TAXATION NO TYRANNY: AN ANSWER TO THE RESOLUTIONS OF THE AMERICAN CONGRESS* (Gale ECCO, Print Editions 2010) (1775)). Jack Rakove has noted that Edmund Burke had a similar insight that "[o]wning slaves made planters perversely more devoted to preserving the liberty they carelessly stripped from others." JACK RAKOVE, *REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA* 68 (2010). Even some Americans served by slaves had a similar realization. Jack Laurens — whose slaveholding father Henry would go on to become President of the Continental Congress — wrote to a fellow South Carolinian in 1776, "[h]ow can we . . . reconcile to our spirited Assertions of the Rights of Mankind, the galling abject Slavery of our negroes." GREGORY D. MASSEY, *JOHN LAURENS AND THE AMERICAN REVOLUTION* 63 (2000).

<sup>70</sup> PURDY, *supra* note 68, at 17.

<sup>71</sup> *Id.* (emphasis added).

## 44 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 45]

society put down and kept out.”<sup>72</sup> And this meant that “[i]t was not *despite* but *because* of its flaws”<sup>73</sup> that more and more Americans successfully demanded that freedom be extended to them. As Purdy eloquently expresses it:

Because the Declaration of Independence was absurdly remote from the practices of its author and many of its signatories, because its theory of government threatened perennial revolution, it became the touchstone of a constitutional tradition of freedom, called on by slaves, women, racial minorities, and gay people to redeem their dignity as Americans.<sup>74</sup>

As an example of this dynamic, Purdy compares the mid-Nineteenth Century responses of William Lloyd Garrison and Frederick Douglass to the U.S. Constitution.<sup>75</sup> Garrison, a white man and an abolitionist, despaired of using the Constitution to effect reform. He famously described it as “a covenant with death, and an agreement with hell.”<sup>76</sup>

But as an African-American, Frederick Douglass saw the possibilities inherent in the Constitution. He viewed the constitutional guarantee of freedom not as a horological actually describing reality in antebellum America, but rather as a chronometric ideal. In a Fourth of July speech in Rochester, New York, in 1852, Douglass supported this view by making an audacious claim: he said the Constitution “interpreted as it *ought* to be interpreted . . . is a glorious liberty document.”<sup>77</sup> Similar to what Abraham Lincoln would do a decade later in the Gettysburg Address,<sup>78</sup> Douglass insisted that the best way to understand the Constitution was to look at it through the powerful lens of the Declaration of Independence. In Purdy’s words, Douglass praised the Founders for refusing to provide “a final answer for the question of

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<sup>72</sup> *Id.* (emphasis added).

<sup>73</sup> *Id.* at 18 (emphasis added).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 25–32.

<sup>76</sup> William Lloyd Garrison, *Address to the Friends of Freedom and Emancipation in the United States*, in DAVID A. HOLLINGER & CHARLES CAPPER, *THE AMERICAN INTELLECTUAL TRADITION*, VOL. I, 1630–1865, 438 (1997).

<sup>77</sup> Frederick Douglass, *What to the Slave is the Fourth of July?*, in HOLLINGER & CAPPER, *supra* note 76, at 445, 448, 458 (emphasis omitted); see also PURDY, *supra* note 68, at 27–28.

<sup>78</sup> See, e.g., GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 130–33 (1992) (discussing Lincoln’s view of the Declaration of Independence as the founding document that both expressed the transcendent ideal of liberty and united the American people as an inseparable union, with the Constitution only perfecting that union).

slavery"; instead, they provided "broad principles that later generations could use in shaping the eventual resolution."<sup>79</sup>

Douglass's own words deserve close attention: "[w]ith [the Founders] nothing was '*settled*' that was not right. With them, justice, liberty, and humanity were '*final*;' not slavery and oppression."<sup>80</sup> And Purdy astutely notes that "Douglass's version of constitutionalism confronted American injustice by asking the country not to *surrender* itself but to *become* itself."<sup>81</sup>

Thus, Douglass's speech is the paradigmatic American jeremiad. First, Douglass recognizes that the high-minded ideals in the Constitution and Declaration were not horologicals describing the nation that existed in the Eighteenth Century; rather, they are chronometric values to which the country pledges to forever aspire. Second, his description of mid-Nineteenth Century America shows the woeful state the country was in because of slavery. Third, he urges that the solution to the current problems lies in a return to the Eighteenth Century: not in the horological sense of a return to what America actually was, but rather a return in the chronometric sense to the aspirational values upon which the country was founded.

Purdy contrasts Douglass's reading of the Constitution with Chief Justice Roger Taney's in the *Dred Scott* case.<sup>82</sup> Unlike Douglass's view that the Constitution establishes values rather than rules, Taney held that the Constitution conclusively settled certain questions for all time: thus, *Dred Scott* held that the racism of the Founders was indelibly written into the Constitution.<sup>83</sup> In Balkin's terms, Douglass sought the "original meaning," while Taney sought the "original expected application."

## V. CONCLUSION

The American jeremiad—and constitutional interpretation, in general—invites each generation to return to the past. But the goal is not for Americans to copy everything that was done in the past; rather, the goal is for Americans to re-dedicate themselves to the chronometric, eternal values expressed in the past, in both the Constitution and Declaration of Independence.

Conceptions of justice constantly change; but the concept of justice does not. We can never fully achieve a chronometric value; as in Zeno's

<sup>79</sup> PURDY, *supra* note 68, at 29.

<sup>80</sup> Douglass, *supra* note 77, at 447; see also PURDY, *supra* note 68, at 29.

<sup>81</sup> PURDY, *supra* note 68, at 29 (emphasis added).

<sup>82</sup> See *Dred Scott v. Sandford*, 60 U.S. (19 How) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; PURDY, *supra* note 68, at 29–30.

<sup>83</sup> *Dred Scott*, 60 U.S. (19 How.) at 393.

46 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 45]

paradox, we can always get closer to the goal, but we will never reach it. But as Sacvan Bercovitch says, the American jeremiad provides a never-ending process: it is “the official ritual form of continuing revolution.”<sup>84</sup>

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<sup>84</sup> BERCOVITCH, *supra* note 27, at 141.